91-1579

Supreme Court, U.S.
FILED
MAR 10 1992
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LAWRENCE S. KRAIN, M.D.,

Petitioner,

v.

RONI NADLER, MARIA LINVILLE, KEITH MONROE, KEITH MONROE, INC., and JAY B. COHN, M.D.,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of California

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does due process require recusal of appellate and supreme court judges who are in pending litigation with a person whose appeal is before them?

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PRAYER

Petitioner Lawrence S. Krain respectfully prays that a writ of certiorari issue to review the judgment and order of the Supreme Court of The State of California entered in this case on January 15, 1992.

OPINIONS BELOW

The opinion of the Supreme Court of the State of California is not published in the official reporters; the court's

opinion denying review is attached hereto in the Appendix. The opinions of the Court of Appeal of the State of California denying his motion to disqualify are not published in the official reporters.

JURISDICTION

On January 15, 1992, the Supreme Court of the State of California denied Petitioner's petition for review and request for disqualification of certain justices. On October 9, 1991, the Court of Appeal of the State of California affirmed in part the lower court's decision of January 5, 1990. A petition for rehearing was filed in the Court of Appeal (October 22, 1991 and denied November 7, 1991). On February 7, 1991, the Court of Appeal denied Petitioner's motion to disqualify certain justices.

PERTINENT CONSTITUTIONAL PROVISIONS

Amendment XIV (equal protection clause)

Amendment XIV, Section 1:

> . . . no state shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

Amendment V (due process clause)

STATEMENT OF THE CASE AND FACTS

For the purpose of this Petition for Review, appellant adopts the statement of facts and statement of the case as (see Appendix) in the Opinion of the Court of Appeal except for facts relevant to an illegal majority under California Rule of Court 29 and for disputed facts raised and noted under each argument herein. Additional facts relevant to the issues presented herein will be incorporated by reference in the arguments which follow each argument to avoid redundancy.

The Appellate Court illegally had jurisdiction and the Republican anti-semitic judges assigned had close ties with judges who Krain was suing in unrelated civil cases. Statements in the opinion prejudicial to appellant were made and these judges delayed appellant's case for three years precluding refiling and denying him due process of law under the 5th and 14th Amendments to the U.S. Constitution; and the Appellate Court took selective judicial notice of cases favorable to respondents and was not impartial.

There have been numerous factual and legal errors as specifically enumerated below especially Justice Froehlich terming appellant Krain a rambling psychotic while denying Krain a chance to amend the complaint in toto due to illness. The related issues of denial of due process and equal protection by the failure of justices to disqualify themselves due to conflicts are grounds for such a petition on United States constitutional grounds enumerated below.

REASONS FOR GRANTING THE WRIT

I.

This Court Should Resolve The Conflict Between The Decisions Of The California Courts And Of This Court As To Whether A Judge, Who Is In Litigation With A Party Before Him, Violates Due Process By Not Recusing Himself.

At the time a panel of the California Court of Appeal for the Fourth Appellate District affirmed the lower court's decision on October 19, 1991, two of the three justices on the panel had been named defendants for over three years in lawsuits in which Petitioner was the plaintiff. At the time the Supreme Court of the State of California declined to review Petitioner's case on January 15, 1991, three of the justices of the California Supreme Court had been defendants for five months to 3½ years in lawsuits filed by Petitioner. Petitioner's lawsuits against Court of Appeal Justice Lucas was filed several years before Petitioner subsequently appealed to the State Court of Appeal. Petitioner's lawsuits against the California Supreme and Appellate Court justices were filed before the Court of Appeal affirmed dismissal of petitioner's case at issue and before he petitioned for review in the California Supreme Court. Thus, all of Petitioner's lawsuits against the justices were filed before those justices had jurisdiction over Petitioner's case. The lawsuits were not vindictive or retaliatory in nature.

On or about February 7, 1991, a motion to disqualify the Justices of Division I and transfer back to Division III was made and denied without reason. Division III had jurisdiction and improperly transferred the case to Divi-

sion I without a formal vote. Appellant had made the motion because he was involved in personal and financial civil rights litigation alleging anti-semitism with the justices of Division I dating back to July 1987 before the appeal on this instant case ensued.

The illegal participation of justices of the 4th Appellate District, Division I, will or did violate appellant's 5th and 14th Amendments rights to due process and equal protection under the U.S. Constitution.

Several cases, *Krain v. Malcolm Lucas, Harmon Scoville, et al.* CV-89-2512-WPG(S) and *Krain v. Allen Kahn, Harmon Scoville, Malcolm Lucas, Edward Panelli, et al.* CV-90-0305-JMI(S) and *Krain v. Ronald George, et al.* 91-15834 (9th Circuit Court of Appeals) and *Krain v. Brown, Justices of the 4th Appellate District, Division I,* 91-56033 on appeal before U.S. 9th Circuit Court of Appeals are in progress and which were filed before this instant case and appeal ensued. Judicial notice of these civil suits is requested under Federal Rules of Evidence 201 and the justices having been served have copies of this material.

As noted by the U.S. Supreme Court in *Liljeberg v. Health Services Acquisition Corporation,* 486 U.S. 847 (1988) at page 865:

> ". . . The very purpose of Section 28 USC 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety wherever possible (a) . . . justices must satisfy the appearance of justice and avoid the appearance of impropriety."

Thus, the *Liljeberg* 1988 case of the U.S. Supreme Court implies that justices knew of their potential liability financially and should have avoided the appearance of impropriety.

Appellant Lawrence S. Krain, M.D. had moved to transfer this case back to Division III or to Division II of the Fourth Appellate District because three justices including the pro tem justice already have ruled:

1. On motions to augument the record on appeal filed in June 1990;

2. On motions to disqualify certain justices which were denied;

3. On motions to return the opening brief which were denied.

It would be a denial of due process under the 5th and 14th Amendments to the U.S. Constitution if the Democratic justices who already have familiarity with the case are arbitrarily and capriciously removed by fiat of a Republican justice David Sills.

In fact, it was wrong to say that three of the justices and the pro tem justice had heard portions of this case in the superior court because:

1. This case is too recent and the three appellate judges in question have been on the appellate not superior court since 1982;

2. This case involved judicially noticing parts of the appellate clerk's transcript in G006408 and other related appeals transcripts which are physically housed in Division III in Santa Ana, notes by the attorneys for Division III on the case which are housed there, and related motions which are housed there. Based on past experiences with deficient transfer procedures, said transcripts and related material did not reach the attention of the justices in Division I.

This is a complicated proceeding where previous appellate rulings in other parts of this coordination proceeding

in favor of the appellant may fail to get proper judicial notice because the filing system and files are physically housed in Santa Ana, not in San Diego.

Appellant asks that this case be returned to Division III for an open and full and fair hearing on the propriety of transfer.

Appellant in the alternative asks that this case be transferred to Division II of the Fourth Appellate District since three past or present appellate justices in Division I are in litigation with appellant in:

1. *Krain v. Myron Brown, Patricia Benke, and William Todd, et al.* CV 87-5889-LEW still in progress in the U.S. District Court in Los Angeles after remand from the 9th Circuit Court of Appeals as Docket No. 90-55417;

2. Daniel Kremer oversaw Krain's Medi-Cal prosecution which has been dismissed but is involved as a related co-conspirator in Krain's other cases against George Deukmejian and Ronald George, his colleagues in the State Attorney General's Office, and is alleged in those pleadings to be anti-semitically biased and has been intimately connected with Luis Vargas and Richard Maitland, attorneys for respondent Linville.

This Court has previously concluded that CCP 170 is not applicable to appellate court justices, but that the federal rules in such matters shall be applicable, *Kaufman v. Court of Appeal* (1982) 31 Cal.3d 933, 940. Appellant asks that this Court also apply the federal law in determining when a violation of an appellant's due process rights has occurred.

This Court is respectfully asked to ask the State Courts to correct its decision in that Krain cannot simultaneous-

ly be a rambling psychotic (Justice Froehlich's opinion) and an artful pleader (page 24, line 14 of appellate opinion) or mudslinger (page 26, line 5) (See Appendix).

Indeed the term rambling psychotic is inconsistent with the terms artful pleader used in the majority court opinion. This does lend credence to Krain's prior challenge of the panel for cause as political hacks appointed by George Deukmejian with whom Krain has two federal lawsuits in progress which are not final.

The term mudslinger indicates bias and should void this Court's decision since "the justices cannot determine that Krain slung mud when what appellant Krain has alleged was defamation. These statements of the Court are requested to be deleted regarding mud slinging and rambling psychosis as they would tend to bias other courts hearing this case and would indicate prejudgment, bias, and inconsistency on the part of this panel.

Appellant Krain disputes and requests the right to amend for legal malpractice against Cohn since Krain was ill (and indeed Justice Froehlich terms Krain a rambling psychotic) and did not have a fair opportunity to amend his claims.

Further, the 5th and 8th causes of action cannot duplicate the legal malpractice action since the causes of action have differing statutes of limitation and if the legal malpractice action is time barred, as the court implies and states at footnote 18 (opinion, page 30) this would improperly deprive Krain of the right to pursue legal malpractice against Monroe and he should be given the right to recover on collateral negligence and breach of contract. Thus, this Court should modify its decision as inherently

inconsistent as its decision infringes on Krain's due process rights.

Also, the invasion of privacy claims against Monroe should stand or appellant should be allowed to amend them since the 8th cause of action (breach of contract) was barred by this Court as duplicative of legal malpractice which was implied to be time barred at footnote 18. Thus, the Court's reasoning denies appellant due process.

To deny a "rambling psychotic" litigant the right to correct a clerical error from 1985 to 1986 on the invasion of privacy claim is unduly taking advantage of illness and is not the intent of the law where a clerical error unlike a judicial error is correctable at any time. See *In re Marrage of Kaufman* (1980) 101 Cal.App.3d 147, 161 Cal.Rptr. 538 and *Commonwealth Land Title Company v. Kornbluth* (1985) 220 Cal.Rptr. 774, 785, 175 Cal.App.3d 531.

As opposing parties in pending litigation, the five justices had a direct and personal interest in the outcome of Petitioner's appeal. The refusal of those five justices to recuse themselves from deciding Petitioner's appeal also created an appearance of partiality. The justices' actual interest in the outcome of Petitioner's case and conflict with defendants who he sided for and the appearance of bias violated Petitioner's due process right to an impartial judiciary. The failure of the California Court of Appeal and the California Supreme Court to recognize and uphold Petitioner's due process rights flatly conflicts with numerous decisions of this Court. If allowed to stand, the California courts' decision in the case will create dangerous precedent that will allow judges to decide cases in which they have an interest in the outcome. Therefore, this Court should take the opportunity presented by Petitioner's case to resolve the conflict between the decisions

of this Court and the decisions of the California courts and thereby reaffirm the due process rights of all litigants to have their cases decided by impartial tribunals especially where anti-semitism is alleged.

Over six decades ago, this Court held that "it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal substantial pecuniary interest in reaching a conclusion against him in his case." *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). In *Tumey*, the judge, who was also mayor, had an interest in the outcome of the case because his compensation derived in part from fines levied against persons he convicted. *See id.* at 522-23.

In *Ward v. Monroeville*, 409 U.S. 57 (1972), this Court also found a due process violation in a mayor serving as judge. Although the mayor's compensation did not depend on the levying of fines, the mayor's responsibility for village finances gave him an interest in whether fines were levied in the cases before him. *See* 409 U.S. at 60.

This Court also has found due process violations where the judge had an interest, albeit not a pecuniary one, in the outcome of a case before him. *In re Murchison*, 349 U.S. 133 (1955), this Court held that a judge who had served as a "one-man grand jury" could not, consistent with the Due Process Clause of the Fourteenth Amendment, also convict a grand jury witness of a contempt charge that arose out of the witness' grand jury appearance. This Court stated that "no man is permitted to try cases where he has an interest in the outcome." *Id.* at 136. A judge's forbidden interest in a case exists in those circumstances that " 'offer a possible temptation to the

average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused. . . .' " *Id.* (quoting *Tumey*, 273 U.S. at 532).

This Court most recently reaffirmed the due process right to an impartial tribunal in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986) and *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). In *Lavoie*, a state supreme court justice voted to affirm an award of damages against Aetna at a time when he had pending litigation involving similar claims against other insurance companies. *See* 475 U.S. at 816-19. Although the state supreme court justice was not a party to the lawsuit between Lavoie and Aetna, this Court held that the justice's involvement in similar pending litigation gave him a direct interest in the outcome of the *Lavoie* case. *See id.* at 821-26.

In *Liljeberg*, a federal district court judge also served as a member of a university's board of trustees. 486 U.S. at 850. The judge refused to recuse himself from hearing a case that, depending upon its outcome, would financially benefit the university. *See id.* at 852-57. Although this Court did not find that the judge had an actual bias, this Court held that the judge's relationship to the university created an appearance of bias. Thus, under Section 455(a) of Title 28, the judge was required to recuse himself because "an objective observer would have questioned [the judge's] impartiality." *See id.* at 861. In so holding, this Court reaffirmed the principle that the appearance of impartiality is a component of the due process right to a fair tribunal. *See id.* at 864-65 & n.12.

Against this backdrop of decisions of this Court, the violation of Petitioner's due process rights hardly could be more blatant. First, the two California Court of Appeal

justices and three California Supreme Court justices had a direct, personal, substantial, and pecuniary interest in the outcome of Petitioner's appeal, and influenced non-biased justices since there were no Jewish justices who sat on Krain's appeal. Petitioner's lawsuit against the justices seek substantial money damages from all defendants and impose on the justices the usual time and financial burdens involved in defending a lawsuit. And, the outcome of Petitioner's appeal has a direct bearing on the success of his lawsuits against those same justices since all defendants would be potential witnesses for the justices.

The five justices' pecuniary interest in Petitioner's case is at least as direct and substantial as was the case in *Tumey*, and is more direct than in *Ward*, *Murchison*, and *Lavoie*. Because this Court required recusal in those cases, the justices' more direct interest in Petitioner's case certainly should mandate their recusal here.

Second, the five justices likely have an actual bias against Petitioner because he sued them for money damages and allegations of civil rights violations against a born Jew under 42 U.S.C. § 1981. At a minimum, the five justices should have been required to establish that they had no actual bias against Petitioner, something they did not do.

Third, even if the five justices had no actual bias against Petitioner, their status as opposing parties in pending litigation created an undeniable appearance of partiality. If a judge's involvement in litigation against an insurance company who is not a party before him creates an appearance of bias, as this Court held in *Lavoie*, then certainly the involvement of judges in litigation with a party whose case *is* before them creates the appearance of a biased tribunal. If an appearance of bias exists when a judge is

a trustee of a university that stands to benefit from the outcome of the litigation before him, as this Court held in *Liljeberg*, then certainly an appearance of partiality exists in Petitioner's case, where the judges themselves stand to benefit from defendant's testimony in their own cases.

Although Section 455(a) of Title 28 does not apply here, the standard contained therein clearly illuminates the due process violation present here. Any objective observer would reasonably question the impartiality of the five justices who are in litigation with Petitioner. As this Court has frequently stated, "The Due Process Clause 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, "justice must satisfy the appearance of justice." ' " *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. at 825 (quoting *In re Murchison*, 349 U.S. at 136 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954))). To allow the lower court to be affirmed by judges who are themselves in litigation with Petitioner would be an affront to the appearance of justice and to the Due Process Clause. This Court should grant Petitioner's writ and prevent any further insult to a litigant's right to an impartial tribunal.

Krain had a right to litigate 42 U.S.C. § 1981 violations against justices under this Court's holding in *St. Francis Hospital v. Al-Khazrajl*, (1987), 107 S. Ct. 2022, 95 L. Ed. 2d 2582 and the Seventh Circuit decisions deciding Jews are a race as well as religion. *Bachman v. St. Ramos Congregation*, 902 F.2d 1259 (1990 7th Cir.), and *Malholm v. Colls and Company*, 885 F.2d 1305 (7th Cir. 1989).

CONCLUSION

Wherefore, Petitioner respectfully prays that this Honorable Court grant this Petition and issue a writ of certiorari to review the final judgment of the Supreme Court of the State of California.

Respectfully submitted,

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APPENDICES

APPENDIX I

[FILED OCTOBER 9, 1991]

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL,
FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

LAWRENCE S. KRAIN,	)	
	)	
Plaintiff and Appellant,	)	
v.	)	D013870
	)	
	)	
RONI NADLER, et al.,	)	
	)	(Super. Ct.
Defendants and Respondents.	)	No. 492153)

APPEAL from orders of the Superior Court of Orange County, Harold F. Wolters, Judge. (Retired judge of the superior court sitting under assignment by the Chairperson of the Judicial Council.) Reversed in part with directions and affirmed in part.

Lawrence S. Krain, M.D., appeals the orders of dismissal entered by the trial court after motions to strike were granted without leave to amend and demurrers were sustained without leave to amend to Krain's first amended complaint, which asserted a number of theories: defamation, professional malpractice, invasion of privacy, and related claims. There were three sets of moving defen-

dants: Maria Linville, represented by the Attorney General's office; defendants Keith Monroe and Keith Monroe, Inc. (attorneys, referred to as Monroe) and Roni Nadler, jointly represented by private counsel; and, finally, Jay B. Cohn, M.D., also separately represented. Krain contends the trial court erroneously concluded his action was sham after having taken judicial notice of many similar actions filed by Krain, as requested by the various defendants. Krain further contends a number of his causes of action are viable and should not have been demurred out.

We have examined this pleading in light of the materials of which judicial notice was requested and conclude the trial court erred in striking the first amended complaint (the amended complaint). We also conclude several of the causes of action were adequately pled, as will be explained. We reverse in part with directions and affirm in part.

FACTUAL AND PROCEDURAL BACKGROUND

Because we review this matter at the pleading stage, we set forth the facts as they appear on the face of the pleadings, accepting as true all material facts properly pleaded, but disregarding contentions, deductions, and conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) We consider the ruling on the motion to strike in accordance with the rule that the grounds for such a motion are limited to matters appearing on the face of the challenged pleading or matters which must or may be judicially noticed. (*Garcia v. Sterling* (1985) 176 Cal. App.3d 17, 20.) We summarize Krain's allegations as they appear in his amended complaint, filed February 17, 1988. Where appropriate, we shall discuss in connection with the particular arguments on appeal his originally pled

allegations appearing in his initial complaint filed June 12, 1986.[1]

We shall first set forth the allegations in the amended complaint that are common to all defendants. The first cause of action for defamation (libel and slander) is pled against all defendants, as are the sixth cause of action for intentional infliction of emotional distress and the seventh cause of action for negligent misrepresentation. Monroe, the attorney, is charged in all causes of action except the second, which is for medical malpractice directed solely at Cohn. Cohn, a psychiatrist, is charged with all causes of action. Generally speaking, Krain alleges that the defendants' actions led to damage to his medical business and reputation, in that they were involved in the events leading up to his being wrongfully charged with criminal offenses. (Medi-Cal fraud), wrongfully subjected to professional disciplinary proceedings, and wrongfully caused to suffer emotional distress and other forms of damage.

Summarizing first the defamation claims, we find the following allegations: Cohn and Nadler between June 1985 and January 1986 allegedly slandered Krain by calling him a murderer, a psychotic schizophrenic, a stupid idiot, and a naive doctor. Defendants Monroe and Linville between September 1985 and March 1986 allegedly made anti-Semitic statements about Krain and stated that he was

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[1] Linville moved to strike the original complaint and received a favorable ruling. Krain then amended the complaint pursuant to Code of Civil Procedure section 472.

All further statutory references are to the Code of Civil Procedure unless otherwise specified.

guilty of Medi-Cal fraud and theft, and was subject to schizophrenic hallucinations and delusions.[2]

Turning to Krain's sixth cause of action for intentional infliction of emotional distress, we learn that all defendants allegedly threatened Krain in front of his patients with false accusations that he was psychotic and guilty of Medi-Cal fraud. Such conduct is allegedly extreme and outrageous and was part of a frameup of Krain allegedly conducted by the Orange County District Attorney and State Attorney General.

In the seventh cause of action for negligent misrepresentation, all defendants are charged with having made false representations: Monroe, that he and his firm would provide adequate and complete legal services to Krain and keep his legal, psychiatric, and correspondence records private; Cohn, that he would keep Krain's psychiatric records confidential; and Linville, that she would provide Krain with copies of Dr. Linville's appointment books. It is further alleged Nadler orally represented to Krain that he was a diamond dealer and would for a fee provide diamonds to Krain and be a rebuttal witness to assist Krain in criminal and administrative proceedings and also would find another witness, Carolyn Alberty, to testify for Krain at his trial. Nadler also allegedly falsely accused Krain of soliciting murder. It is alleged that all of the

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[2] Allegations against Maria Linville (Linville) are coupled with allegations against Betty Linville who is no longer involved in this action. Both Maria and Betty Linville were the heirs of Marie Linville, M.D., whose medical practice Krain (a dermatologist) at one time considered buying. Maria Linville was a witness in the criminal action against Krain. Krain has attempted to plead around any applicable governmental immunity (e.g., Gov. Code § 821.6) by asserting that her conduct occurred in unprivileged legal and judicial settings.

above representations were made with intent to deceive or with intent to induce Krain to enter into the various transactions or, alternatively, were made without reasonable grounds for believing them to be true.

All remaining causes of action, except the second cause of action for medical malpractice pled solely against Cohn, are pled against both Monroe and Cohn. The third cause of action for attorney malpractice charges both Monroe and his firm, as well as Dr. Cohn, with legal malpractice.[3] The legal malpractice cause of action claims that professional duties of confidentiality and adequate representation were breached. Delayed discovery that the acts of Monroe and Cohn constituted malpractice is alleged. Krain then lists a number of respects in which he contends professional duties were breached: false and inadequate legal advice, conflict of interest, drunkenness at certain hearings, and inadequate representation. Krain alleges that as a direct result of this malpractice he lost by injunction his medical license to practice and was falsely criminally imprisoned for six months and had to be hospitalized due to mental distress.

It is further alleged against Monroe and Cohn (fourth cause of action) that they invaded Krain's privacy in violation of his California constitutional rights (art. VIII, § 1) by publishing private facts about his financial, legal, and psychiatric history to insurance investigators and prosecutors. The same disclosure of Krain's records is the basis

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[3] It was shown at the hearing that Dr. Cohn was not a licensed attorney pursuant to judicial notice materials he supplied, i.e., membership records of the State Bar of California. (Evid. Code, §§ 452, subd. (d)(1), 453; see *Pomeroy v. Collins* (1926) 198 Cal. 46, 69-70.) The augmented record shows Krain opposed Cohn's request for judicial notice of these records as inadequate in form.

of the fifth cause of action for negligence against Monroe and Cohn, and is also the basis of the eighth cause of action for breach of written contract against Monroe and Cohn, in that the disclosure of records and the inadequate legal advice alleged constituted a breach of professional retainer contracts.

The individual defendants attacked the amended complaint in various ways. Linville, Monroe, and Nadler brought motions to strike the pleading on the basis that is contained irrelevant, false and conclusory material. (§ 436, subd. a.)[4] They argued Krain's entire first amended complaint was a sham pleading because it could be demonstrated by means of judicial notice that it was part of a large group of actions maintained by Krain making similar allegations, all arising out of his prosecutions for Medi-Cal fraud and his disciplinary proceedings. This group consisted of several subgroups: (1) Nine consolidated actions of which the one we review is part;[5] (2) twenty other civil

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[4] Section 436 states as follows: "The court may, upon a motion made pursuant to Section 435, or at any time in its discretion, and upon terms it deems proper: [¶] (a) Strike out any irrelevant, false, or improper matter inserted in any pleading. [¶] (b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court."

[5] Although Linville's respondent's brief states the actions were coordinated pursuant to section 404 et seq., the record shows a petition to coordinate these actions was denied October 23, 1986, but consolidation of these nine actions, of which this is one, was ordered. (§ 1048.) This information appears in one of the consolidated files, Krain v. Haughton (Super. Ct. Orange County, 1985, No. 457762), which we have examined pursuant to our power to take judicial notice of this material. (Evid. Code, § 459, and subd. (a).) However, another noticed file, Krain v. Johnson (Super. Ct. Orange County, 1985, No. 452434) contains references to a Judicial Council Coordination Proceeding No. 2008, in which eight of

(Footnote continued on following page)

actions filed by Krain in the superior courts of Orange, San Bernardino, and Los Angeles Counties, all arising out of the aftermath of his criminal and administrative prosecutions;[6] and (3) four criminal prosecutions filed against

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[5] *continued*
Krain's cases, including this one, are currently being managed. We shall use the "consolidation" designation for convenience.

The remaining seven consolidated actions are: Krain v. Sundin (Super. Ct. Orange County, 1985, N. 456783), Krain v. Wade et al. (Super. Ct. Orange County, 1985, N. 452841), Krain v. Johnson (Super. Ct. Orange County, 1985, No. 452434), Krain v. Hodges (Super. Ct. Orange County, 1983, No. 407080), Krain v. White (Super. Ct. Orange County, 1985, No. 470722), Krain v. Hilbrick (Super. Ct. Orange County, 1983, No. 418329), Krain v. Alfano et al. (Super. Ct. Orange County, 1985, No. 452819).

[6] These related cases included the following, as supplied to this court pursuant to our orders of April 15, 1991: Krain v. Martin Luther Hospital (Super. Ct. Orange County, 1978, No. 284575), Krain v. American Medical Int. (Super. Ct. Orange County, 1978, No. 289275), Krain v. Orange Co. Medical Assn. (Super. Ct. Orange County, 1978, No. 296407), Krain v. Gerald A. Berry (Super. Ct. Orange County, 1978, No. 303013), Krain v. Marshall B. Grossman (Super. Ct. Orange County, 1979, No. 321835), Krain v. Thomas J. Wilkie (Super. Ct. Orange County, 1980, No. 332343), Krain v. Evelyn O. Kert (Super. Ct. Orange County, 1980, No. 345625), Krain v. No. Orange County Mn. (Super. Ct. Orange County, 1983, No. 398838), Krain v. Isabelle Conrad (Super. Ct. Orange County, 1983, No. 408129), Krain v. Lorna A. Voboril (Super. Ct. Orange County, 1983, No. 416439), Krain v. F. V. Community Hosp. (Super. Ct. Orange County, 1984, No. 422144), Krain v. Arthus Guy, Jr. (Super. Ct. Orange County, 1984, No. 429138), Krain v. Tim Alger (Super. Ct. Orange County, 1985, No. 452946), Krain v. Kaushal K. Sharma, M.D. (Super. Ct. Orange County, 1985, No. 452947), Krain v. Lawrence Silver (Super. Ct. Orange County, 1985, No. 456203), Krain v. State of California (Super. Ct. Orange County, 1985, No. 456782), Krain v. James P. Slack (Super. Ct. Orange County, 1985, No. 474786), Krain v. Hodges and Wade (Super. Ct. Orange County, 1986, No. 482555), Krain v. Mark Crabtree (Super. Ct. Los Angeles County, 1985, No. C575879), Krain v. Augustus Kasper (Super. Ct. San Bernardino County, 1985, No. 229575).

Krain.[7] Judicial notice was requested of all these filed, pursuant to Evidence Code, section 452, subdivision (d)(1).

Chief among this group of actions were the nine consolidated actions, of which the action we review is one. Five of those actions (Krain v. Sundin (*supra*, No. 456783), Krain v. Wade et al. (*supra*, No. 452481), Krain v. Johnson (*supra*, No. 452434), Krain v. Hodges (*supra*, No. 407080), Krain v. Alfano et al. (*supra*, No. 452819)) contain allegations of anti-Semitic conduct by the defendants, as well as allegations that they called Krain dishonest and/or a faker of mental illness. Two other such consolidated cases (Krain v. White (*supra*, No. 470722) and Krain v. Hilbrick (*supra*, No. 418329)) do not contain the allegations of anti-Semitic conduct, but do include allegations that the defendants said Krain was guilty of medical fraud. In Krain v. Haughton (*supra*, No. 457762), Krain alleged that he received improper medical treatment while in jail. Thus, although there is a common thread among these consolidated cases in that they all are related to Krain's criminal and administrative prosecutions and their aftermath (and are filed against witnesses, prosecutors, and investigators), there are distinctive features about several of these cases.

The theories of the many other civil actions filed by Krain also vary. They are brought against various persons (such as witnesses, prosecutors, and investigators) alleged to have defamed Krain or to have committed other actionable conduct arising out of the transactions which resulted in his criminal and administrative prosecutions.

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[7] The criminal files, as provided to this court pursuant to our order of April 15, 1991, were People v. Krain: (Super. Ct. Orange County, 1984, No. C-62437), (Super. Ct. Orange County, 1982, No. C-51539), (Super. Ct. Orange County, 1982, No. C-50403), and (Muni. Ct. Orange County, 1984, No. NF-84-000223).

(See fn. 6, *ante*.) Several files also represent Krain's disputes with several hospitals over leased premises and staff privileges, a dispute with the State of California over Medi-Cal billings, and a dispute with a county medical association over patient referrals. Notice of Krain's criminal prosecutions files was also requested. (See fn. 7, *ante*.) In accordance with the procedure set out in section 437, subdivision (b),[8] all these cases were listed in the moving papers on the motions to strike.

Linville stated that all her requests for judicial notice were made for the purpose of demonstrating: "(1) [T]he pendency of the numerous civil actions which have as the operatives [sic] bases allegations of libel and slander and (2) the fact plaintiff has previously been found to be a vexatious litigant and has been required to post security for costs as a result of being declared a vexatious litigant."[9] (A fn. in Linville's papers then states: "This Court, in various of the above-captioned proceedings has

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[8] Section 437 provides: "(a) The grounds for a motion to strike shall appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice. [¶] (b) Where the motion to strike is based on matter of which the court may take judicial notice pursuant to Section 452 or 453 of the Evidence Code, such matter shall be specified in the notice of motion, or in the supporting points and authorities, except as the court may otherwise permit."

[9] On this point, Linville was referring to an order made in Krain v. Haughton (*supra*, No. 457762), finding Krain to be a vexatious litigant (§ 391 et seq.) and ordering him to post $30,000 security for costs. Our review of the file in that case (made pursuant to Evid. Code § 459, subd. (a)) discloses that no dismissal was ever entered upon Krain's failure to post such security, as this court found in our opinion reviewing an order imposing sanctions and an order denying a judicial disqualification motion by Krain. (Krain v. Haughton (Dec. 11, 1987) D005880 & Krain v. Haughton (Dec. 11, 1987) D005882.

denied defendant State of California's motion to declare plaintiff [a] vexatious litigant.")[10]

In support of their motion to strike, Monroe and Nadler further requested judicial notice of several related federal cases against Nadler and/or Monroe,[11] in each of which Krain alleged there was a conspiracy among the various defendants, including judicial officers and state-appointed counsel who represented Krain in his criminal cases, to deprive Krain of his civil rights because he is Jewish and because he is a Democrat. Copies of these three federal complaints were lodged with the superior court and have been supplied to this court for purposes of judicial notice. Monroe and Nadler then argued, "The sheer numerosity of cases instituted by Krain demonstr[a]tes that he is using the court system as a means to harrass [sic] those who [sic] he perceives as his enemies. Therefore, this court should strike Krain's entire present complaint." As grounds for the motions to strike, Linville, Monroe and Nadler relied on sections 435 and 436.

In addition to the motions to strike described above, the trial court had before it general and special demurrers filed by Monroe, Nadler, and Cohn. Monroe and Nadler demurred to all the causes of action pled against them (the entire amended complaint except the second cause of action for medical malpractice). Monroe and Nadler

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[10] In the case we review (as well as in five other consolidated cases), the trial court on December 30, 1987 denied without prejudice a defense motion for security for costs from plaintiff as a vexatious litigant (§ 391 et seq.). This order appears in the superior court file we have reviewed. (Evid. Code, § 459, subd. (a).)

[11] Krain v. Kasper et al. (C.D. Cal. 1986, No. 86-5881), Krain v. Gislason et al. (C.D. Cal. 1987, No. 86-7676), and Krain v. Grimes et al. (C.D. Cal. 1989, No. 87-0961).

claimed that all the causes of action alleged against them were uncertain (§ 430.10, subd. (f)), and all causes of action except the defamation and negligent misrepresentation causes of action failed to state sufficient facts. (§ 430.10, subd. (e).) They also claimed the facts alleged were inherently improbable and contradicted the allegations in the original complaint, as will be discussed *post.*

Dr. Cohn generally demurred (and specially demurred, in part) to only four of the eight causes of action alleged against him: the second cause of action for medical malpractice, the third for legal malpractice, the fourth for invasion of privacy, and the seventh for negligent misrepresentation. He made no specific attacks on any other causes of action, nor did he bring a motion to strike on his own behalf.

Judge Harold F. Wolters was specially assigned to rule on the consolidated cases. After the demurrers and motions to strike were duly filed and served, Judge Wolters took them under submission on April 29, 1988. The minute order for that date notes: "No appearance by plaintiff Lawrence Krain due to commitment to Hospital. Counsel presented oral argument. Written declarations on behalf of defendants Monroe, Monroe, INC. and Nadler received and ordered filed this date." Unfortunately, the court file was then lost and had to be reconstructed by counsel refiling all documents as originals. Thereafter, on January 5, 1990, Judge Wolters issued written orders ruling on the demurrers and the motions to strike. With regard to the motions to strike, Linville's motion was granted in its entirety, the court noting:

> "The plaintiff's amended complaint does nothing to correct the previous finding of the Court to the effect that the pleading is a sham. That which was added was either irrelevant, false or simply conclusionary."

With respect to the motion to strike by Monroe and Nadler, in granting the motion in its entirety the court noted:

> "This case was consolidated with a number of other cases involving the same plaintiff, there being approximately nine (9) such cases. The Court takes Judicial Notice of these cases and all pleadings and orders filed therein. Of particular importance at the outset is to note that these cases are all virtually identical in their nature, that is in that each case makes the same type of claim or claims on behalf of the plaintiff but against a number of different defendants. The defendants in these cases all bear a kind of common relationship toward plaintiff in that each is somehow involved in legal proceedings, other than these, which involve the plaintiff in a professional capacity.
>
> "With respect to these motions to strike, upon the basis that the complaint is false, improper and a sham, the motion is granted. It is easy to determine by reading all of plaintiff's pleadings that the same are designed solely to involve the defendants in a legal action without lawful basis for the action. One cannot really believe so many of these defendants at separate times, in separate places would for example make the same comments of or concerning the plaintiff. It is easy to see that this plaintiff simply sues people he perceives to be his adversary or enemy.
>
> "It would not serve legal purpose to enumerate all the pleading facts utilized by plaintiff in these various cases which indicate the improper nature of these complaints as sham pleadings.
>
> "The complaint herein is ordered dismissed as to all defendants."

With respect to the demurrers, both Cohn's and Monroe's and Nadler's were sustained in their entirety without leave to amend. The ruling on Dr. Cohn's demurrer states as follows:

"1. The demurrer to the second cause of action is sustained without leave to amend on both grounds set forth, ie [sic] insufficient facts to state a cause of action and uncertainty. The cause of action purports to be for medical malpractice yet fails *completely* to allege the facts of the treatement complained of which facts caused injury. The allegations such as are made are also therefore uncertain.

"2. The demurrer to the alleged third cause of action is sustained without leave to amend. This cause of action purports to be one for legal malpractice. The Court takes Judicial Notice of the fact that Dr. Cohen [sic] is not a member of the California State Bar, thus no cause of action for attorney malpractice can be alleged.

"3. The demurrer to the alleged fourth cause of action is sustained without leave to amend. This alleged cause of action purports to be one for invasion of privacy. The statue [sic] of limitations for such an action is one (1) year. The complaint alleges to conduct of defendant to have occurred in May of 1985, the complaint was filed in June of 1986.

"4. The demurrer to the alleged seventh cause of action is sustained without leave to amend. This purports to be a cause of action for negligent misrepresentation, the tort of fraud. Each of the elements of a claim for fraud must be specifically plead. As indicated by defendant the plaintiff fails to allege factual misrepresentation and reliance thereon and fails to correlate an injury and damage directly to a misrepresentation."

The demurrer by Monroe and Nadler was sustained without leave to amend and the court noted:

"This convoluted pleading of the plaintiff is in many instances contradictory of the original complaint, it fails to allege specific facts where required and, again, a comprehensive reading of this document in conjunc-

tion with the many other filed 'complaints' by this plaintiff indicates this to be a sham and the alleged facts to be inherently improbable."

Krain timely appealed the orders of dismissal.[12]

DISCUSSION

Introduction

Because the orders striking the complaint and sustaining the demurrers without leave to amend represent such a drastic curtailment of the plaintiff's right to pursue his claims, this court has prepared for our consideration of this appeal by taking the following steps:

1. Inquiring of the parties' positions (which are conflicting) on the relevancy of the records in the eight other consolidated cases to this appeal and the relevancy of the filings in other appellate records.[13]

2. Notifying the parties of our power to take judicial notice of those Court of Appea records cited by the parties in their briefs. (See fn. 13, *ante*.)

3. Obtaining the superior court files in 30 Orange County Superior Court cases and 1 Orange County Municipal Court case (see fns. 5, 6 and 7, *ante*.)

4. Obtaining the superior court file in the Los Angeles case of Krain v. Crabtree (*supra*, No. C575879).

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[12] The orders of dismissal constituted a judgment for all purposes including review. (§ 581d.)

[13] These appellate records include appeals taken by Krain in other actions in the consolidated group, G008222-G008226 (*Krain v. Johnson et al.* (July 27, 1990) G008222, G008223, G008224, G008225, G008226); *Krain v. Sundin* (Sept. 29, 1989) G006408, and an appeal decided by the Second District Court of Appeal, *Krain v. Crabtree* (Nov. 3, 1988) B021580.

5. Obtaining the superior court file in the San Bernardino County Superior Court action Krain v. Kasper (*supra*, No. 229575).

6. Obtaining copies of the lodged documents, i.e., the federal court complaints of which judicial notice was requested at the trial court level.

Our review of these materials has led us to conclude the motion to strike was erroneously granted for the reasons we will explain below. Moreover, certain portions of the rulings on demurrer were in error as will be explained in part II, *post*.

I

Motion to Strike

The general rule is that trial courts are required to proceed with particular caution when disposing of actions at the pleadings stages. "If the [complaint's] allegations in question did no more than shadow forth the semblance of a cause of action they would be proof against assault upon the ground that they were sham and frivolous. [Citations.]" (*McClung v. Watt* (1922) 190 Cal. 155, 160-161.) Similarly, " '[w]here a motion to strike is so broad as to include relevant matters, the motion should be denied in its entirety.' [Citation.]" (*Triodyne, Inc. v. Superior Court* (1966) 240 Cal.App.2d 536, 542.)

A motion to strike may be addressed to "any irrelevant, false, or improper matter inserted in any pleading" (§ 436, subd. (a)) or may seek to have stricken "all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." (§ 436, subd. (b).) Under section 437, subdivision (a), the grounds for such a motion shall appear on the face of the challenged pleading or from matter of which judicial notice is required. (Evid. Code, §§ 451, 453.)

In addition to the statutory procedure outlined above, a judicially developed "speaking motion to dismiss or strike" (*Vesely v. Sager* (1971) 5 Cal.3d 153, 167, fn. 4) was developed, which is "supported by facts outside the pleadings," such as those set forth in an affidavit or declaration. (*Ibid.*) Current rules of procedure require this type of motion to be treated as a motion for summary judgment, pursuant to section 437c. (*Id.* at p. 169.) Krain generally contends the orders granting the motions to strike were improper because an inadequate factual showing was made to support a summary judgment or "speaking" motion to strike. He bases this contention on his opposition to the requests for judicial notice, claiming this opposition created disputed facts (citing *Barreiro v. State Bar* (1970) 2 Cal.2d 912, 925). This argument is not well taken, however, because this motion to strike, grounded on judicially noticeable materials, is fundamentally a pleading matter confined to the face of the amended complaint (§ 437, subd. (a)) and the faces of the noticed documents, rather than the summary judgment proceeding inquiring into the existence of disputed facts.[14]

In analyzing the propriety of these orders striking the amended complaint, we restrict our inquiry to the extent to which proper judicial notice supports those orders. The applicable rule is that where judicial notice is taken of a court file, the court may take notice of the existence of the documents therein, " ' " but can only take judicial notice of the truth of facts asserted in documents such

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[14] We also disagree with Krain that the trial court abused its discretion in proceeding with the hearing, taking the matter under submission, and issuing a written ruling in Krain's absence. The augmented record shows his opposition was duly filed and we presume it was duly considered. (Evid. Code, § 664, official duty regularly performed.)

as orders, findings of fact and conclusions of law, and judgments." ' [Citations.]" (*Garcia v. Sterling, supra*, 176 Cal.App.3d 17, 22.)

Here, the defendants sought judicial notice of the entire court files of other actions filed by Krain that had similar theories and allegations, as well as any federal court complaints. As observed above, the proper extent of such notice was limited to the existence of the documents, except for facts appearing in orders and judgments. On that basis, the trial court concluded the face of these several pleadings showed this particular action was sham. Specifically, the court ruled that, as to Linville's motion, the allegations added to the amended complaint did not cure any of the problems identified in the earlier ruling, but instead were "irrelevant, false or simply conclusionary." The court then struck the amended complaint for the reasons as previously stated in the earlier ruling, which had found "a common pattern of allegations of conduct and statements in the various complaints attributed to the various defendants" that were so repetitive "that common sense . . . indicates the same to be of an improper or false nature to create a sham pleading."[15]

[15] It should be noted that to the extent the trial court relied on a characterization of Krain's action as "sham," the court was not supported by current statutory language. Former section 453 (predecessor to current section 436) spoke of the power to strike "sham," "irrelevant and redundant" matter (former § 453); the current statute speaks of "irrelevant, false, or improper matter" (§ 436, subd. (a)), or matter that was "not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." (§ 436, subd. (b).) (See *Garcia v. Sterling, supra*, 176 Cal.App.3d 17 discussing the limited power of the court to engage in statutory construction or unambiguous language, such as new § 436.)

Similarly, in ruling upon Monroe's and Nadler's motion to strike, the trial court stated its determination that all of Krain's pleadings "are designed solely to involve the defendants in a legal action without lawful basis for the action." The court further stated its disbelief that so many defendants at separate times and in separate places had made the same comments about Krain, and ruled the complaints were sham pleadings. It thus appears from these orders that the trial court intended to exercise not only its statutorily granted powers (§§ 435-437), but also an "inherent power of the court to control the use of the processes[ ] of the court."

Generally speaking, the "inherent powers" of the court are primarily of an administrative nature which enable it to function as an independent constitutional branch of government. (*Bloniarz v. Roloson* (1969) 70 Cal.2d 143, 147-148; see also §§ 128, 187, and 2 Witkin, Cal. Procedure (3d ed. 1985) Courts, § 137 et seq., pp. 160-165.) However, some early cases involving motions to strike spoke of the " 'inherent power of the court' " (*Cunha v. Anglo California Nat. Bank* (1939) 34 Cal.App.2d 383, 390) as a basis for the court's authority to summarily dispose of litigation found to be abusive, " 'sham, frivolous or wholly vexatious.' " (*Andrews v. Joint Clerks etc. Committee* (1966) 239 Cal.App.2d 285, 301-302; see also *Utz v. Aureguy* (1952) 109 Cal.App.2d 804, 806.) In *Cunha v. Anglo California Nat. Bank, supra*, 34 Cal.App.2d 383, affidavits were submitted by the defendant and believed by the court to show plaintiff's action was " 'groundless, vexatious, and harassing.' " (*Id.* at p. 391.) Thus, in effect, a summary judgment was granted. In *Andrews v. Joint Clerks etc. Committee, supra*, 239 Cal.App.2d 285, a later action by the same plaintiff was found to be merely a sham continuation of the original proceeding that was

a vehicle for judge-shopping. (*Id.* at p. 301.) The trial court thus correctly concluded from its analysis of the related court files that the later proceeding was unnecessary and improper. In both of these cases, the inherent power of the court was exercised on a strong showing of specific facts.

We must determine whether these orders by the trial court were supported by a similarly strong showing, by way of the judicially noticed material, of the impropriety of this action. First comparing the allegations of this pleading to those in the eight other consolidated cases, we first note that six of those cases (Krain v. Hodges (*supra*, No. 407080), Alfano et al. (*supra*, No. 452819), Wade et al. (*supra*, No. 452841), Johnson (*supra*, No. 452434), White (*supra*, No. 470722), and Hilbrick (*supra*, No. 418329)) plead only libel and slander (plus invasion of privacy as to White only). The other two cases are more complex: In Krain v. Sundin (*supra*, No. 456783), in addition to libel and slander, Krain pleads interference with prospective business interests and economic advantage, including breach of contract, and intentional infliction of emotional distress. In Krain v. Haughton (*supra*, No. 457762), medical malpractice arising out of jail medical treatment is alleged. We shall discuss the similarities and differences among these nine consolidated actions with reference to the several theories of recovery.

Krain's libel and slander allegations, made in eight of the nine consolidated cases as noted above, may be grouped into several categories, which overlap to some extent: like the case before us, one case combines allegations of anti-Semitic statements and accusations of medical fraud (Sundin); two allege only accusations of medical fraud (Hilbrick and White); and four include allegations of anti-Semitic statements and dishonesty. The various defendants all were

involved in some way in Krain's criminal or administrative proceedings. The times at which the alleged defamatory statements were made allegedly ranged from September 1982 (Hodges (*supra*, No. 407080)), to 1983 (Hilbrick (*supra*, No. 418329)), to April or May 1984 through November 1984 (Sundin (*supra*, No. 456783)) or through February or March 1985 (Wade et al. (*supra*, No. 452841), Alfano et al. (*supra*, No. 452819), Johnson (*supra*, No. 452434), and on into June 1985 through January 1986 in the case before us (*Krain v. Nadler et al.*).

Based on our review of these filed, as well as the other files of Krain's actions described above, we agree with the trial court the similarities among these various defamation claims are so great as to defy belief in the totality of the allegations. We also agree there is a distinct possibility Krain is perpetrating an injustice on the various defendants involved in these actions. However, these matters cannot be resolved at the pleadings stage; any rule allowing such resolution would be subject to abuse by disallowing redress of legitimate grievances by unpopular plaintiffs. We conclude that judicial notice of the mere existence of these other filings does not establish a prima facie case that each and every one of Krain's defamation claims is sham. At this pleadings stage of the action, where no "speaking" motion to strike is before us, we are mandated to restrict our review to the face of the challenged pleadings. (§ 437, subd. (a); Evid. Code, §§ 451, 452, 453.) The alleged defamatory conduct is pleaded as occurring over a four-year period with respect to the different defendants, and the claimed statements vary to some degree. Even if this is merely artful pleading on Krain's part, we do not believe a determination of "sham" pleading is proper on this motion to strike as supported by these noticed documents. On this record, the trial

court's order striking the pleadings as to the defamation claims was not supported by statute or by the "inherent power" of the court.

Turning to the other claims pled by Krain in this action, we first note the type of legal malpractice alleged is not a common theme among the other lawsuits. (See our discussion in part II, *post*, of the merits of the demurrers to this and related causes of action.) Judicial notice and an order striking the pleading therefore could not properly dispose of this claim as totally without merit.

Moreover, as to the medical malpractice alleged, similar considerations apply. Although Krain did allege medical malpractice by jail doctors in the Haughton suit (*supra*, No. 457762), that claim is very different from the facts alleged against Cohn, who treated and advised Krain in connection with his incompetency proceedings. The motion to strike thus addressed relevant matters and should not have been granted as to this claim. (*Triodyne, Inc. v. Superior Court*, *supra*, 240 Cal.App.2d 536, 542; see part II, *post*, for our discussion of the demurrer to this cause of action.)

Similarly, the negligent misrepresentation claims alleged have unique features that distinguish them from the remaining eight consolidated actions or other civil actions. On the entire record, we believe it is obvious the trial court (while sorely tried and understandably frustrated by Krain's incredible barrage of claims) erred in granting these motions to strike on the limited showing offered. We are reluctant to uphold these orders by expanding the scope of the authority allowed under section 435 et seq., or under the summary judgment theory of the motion to strike, in light of the panoply of remedies the Legislature and judicial precedent have devised for preventing the

pursuit of meritless or frivolous actions: e.g., motions for summary judgment and judgment on the pleadings, the vexatious litigant procedure (§ 391 et seq.),[16] as well as monetary sanctions under section 128.5. In reviewing this matter at the pleadings stage, we are as yet unable to say there is not even the seed of a valid cause of action germinating amid the mud slung by Krain. Accordingly, we reverse the orders in part on this point.

II

Demurrers

We proceed to review the orders sustaining the various demurrers without leave to amend. We must consider whether the amended complaint states facts sufficient to constitute the causes of action (§ 430.10, subd. (e)), and whether there is any reasonable possibility that any defects could be cured by amendments shown to be possible by the plaintiff. (*Blank v. Kirwan, supra*, 39 Cal.2d 311, 318.) With regard to the demurrers for uncertainty (§ 430.10, subd. (f)), we consider whether the allegations of material facts are left to surmise. (*Ankeny v. Lockheed Missiles & Space Co.* (1979) 88 Cal.App.3d 531, 537.)

We address each cause of action in turn, except as noted. With respect to the *cause of action* for defamation, a special demurrer for uncertainty was leveled against it by Monroe and Nadler; Cohn did not demur (nor did Linville demur to any of the causes of action). The elements of this claim are publication to third persons of specified false and defamatory matter. (5 Witkin, *op. cit. supra*,

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[16] As noted above, a previous motion for security for costs based on section 391 was denied without prejudice. We express no opinion as to the success of any such motion if renewed.

Pleading, § 684, pp. 137-138.) Monroe and Nadler characterize the entire pleading and specifically the defamation claim as ambiguous and incoherent, and argue that there is uncertainty as to the dates on which the alleged conduct took place (based on Krain's particular allegations of tolling of the statute of limitations and late discovery based on his false imprisonment and mental illness, and defendants' absence from the state, all occurring between 1984-1986). However, Nadler's defamatory statements are specifically alleged to have been made between June 15, 1985 and January 1, 1986, while Monroe's defamatory conduct is pleaded to have occurred between September 1, 1985 and March 10, 1986. Disregarding any irrelevant allegations about the supposed tolling of the statute of limitatons, material facts are not left totally to surmise. (*Ankeny v. Lockheed Missiles & Space Co., supra*, 88 Cal.App.3d 531.) The uncertainty demurrer should have been overruled as to the defamation claim.

With regard to the *second cause of action* for medical malpractice, Cohn generally and specially demurred. Krain has pled Cohn's legal duty as a physician by alleging Cohn's professional status and his employment to perform professional services. (4 Witkin, Cal. Procedure, *op. cit. supra*, Pleading, § 542, p. 575.) Cohn argues Krain's allegations of negligent treatment between April 1984 and April 1986 are conclusory, and that it is inconsistent for Krain to allege Cohn negligently diagnosed and treated him as a psychotic, paranoid schizophrenic while at the same time alleging his own (Krain's) mental incompetence and insanity between April 12, 1984 and October 1985. For pleading purposes, we do not think it too lenient to conclude that general background allegations of mental incompetence and insanity do not bar more specific allegations of misdiagnosis and mistreatment by a physician.

Krain alleges one specific respect in which Cohn's treatment was negligent: improper prescription of medication which worsened his condition. We believe sufficient facts are stated to plead medical malpractice and that the pleading is not fatally uncertain as to the material facts.

Turning to the *third cause of action* for legal malpractice, we first address Cohn's claim that since judicially noticed materials showed he was not a member of the State Bar, no cause of action of this nature could be stated against him. (See fn. 3, *ante*.) The amended complaint flatly states that Krain relied on false representations by Cohn that he was a licensed attorney. However, in his seventh cause of action for negligent misrepresentation, Krain repeats his claim that Cohn claimed to be licensed as an attorney. We conclude Cohn is improperly charged with legal malpractice and his demurrer to this cause of action was properly sustained. However, Krain should have been allowed to seek amendment of his negligent misrepresentation claim on this theory concerning Cohn's representations, as we will later discuss.

Krain has also pled legal malpractice against Monroe. The Supreme Court in *Budd v. Nixen* (1971) 6 Cal.3d 195 set forth the elements of such a cause of action: (1) the duty to use such skill, prudence and diligence as would other members of the profession; (2) breach of duty, (3) proximate causation, and (4) actual loss or damage. Legal malpractice constitutes both a tort and a breach of contract. (*Neel v. Magana, Olney, Levy, Cathcard & Gelfand* (1971) 6 Cal.3d 176, 181.) Krain has pled a number of acts which allegedly constituted breaches of the duty of care owed: false advice, disclosure of confidential correspondence and psychiatric files, appearing at hearings late and drunk, failure to investigate and file appropriate motions. Proximate causation and damage is generally alleged.

Monroe's demurrer to this claim argued that each required element of the cause of action was inadequate: There was failure to plead an attorney-client relationship as to a particular transaction, failure to plead which defendant is responsible for which breach, and failure to plead a causal connection between Monroe's conduct and the resulting injury. Monroe also claimed that a judicially noticed federal court complaint (Krain v. Kasper, *supra*, No. 86-5881JMI(P)) showed Krain was committed to Patton State Hospital on June 11, 1985, so that this action filed June 12, 1986, is time-barred (facts giving rise to the cause of action were discovered more than a year before filing).[17]

Our reading of this legal malpractice cause of action shows that some of these grounds have merit; however, amendment of the pleading after demurrer should have been allowed. First, as to the duty pled, Krain alleged an attorney-client relationship existed due to retainer documents dated 1985-1987 (although the original complaint was filed in June 1986.)[18] Krain refers to the criminal prosecutions and commitment proceedings as the subject of the attorney-client relationship. That is enough to plead duty. (*Brandlin v. Belcher* (1977) 67 Cal.App.3d 997, 1001.)

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[17] Due to the complexity of these facts, and Krain's many hospitalizations as reflected in the court files, we do not believe for purposes of pleading that this one commitment can be said to have placed Krain on notice of alleged legal malpractice committed against him so as to start the statute of limitations running. (Also see § 340.6, subd. (a)(4), disability to commence legal action.)

[18] Since all of the same acts are alleged in the two versions of the pleading, the original filing date of the complaint (1986) controls and the 1987 allegations of malpractice are thus improper. (§ 464, supplemental complaint required for after-occurring allegations.)

Sufficient general allegations of proximate causation and injury are also pled. However, Monroe is correct that the pleading fails to specify which defendant is responsible for which alleged breach. It also appears that some of the allegations may be time-barred (as, for example, the introductory claim that Monroe was initially retained in 1982; also the 1987 allegations appear to be improper as noted above). On the confusing mass of allegations pled, it is impossible to apply the pertinent statute of limitations (§ 340.6) and its potential statutory exceptions (e.g., § 340.6, subd. (a)(2), (4), continuing representation on the matter or legal or physical disability; also see *Hsu v. Mt. Zion Hospital* (1968) 259 Cal.App.2d 562, 574.) Therefore, both the general and special demurrers have merit; however, Krain should be entitled to at least one more chance to attempt to amend to clarify these problem areas.

The *fifth and eighth causes of action*, for negligence and breach of contract respectively, allege matters that are for all practical purposes indistinguishable from the matter alleged in the current claim for legal malpractice. As noted above, such a cause of action has a dual nature, including both contractual and tort features. (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand, supra*, 6 Cal.3d 176, 181.) For these reasons, the trial court was correct in sustaining Monroe's general demurrer to those claims without leave to amend. However, Cohn is also charged with those causes of action and did not demur to them; accordingly, they survive as to Cohn.[19]

Proceeding to the *fourth cause of action* for invasion of privacy, both Monroe and Cohn generally demurred on

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[19] It should also be noted that Linville did not demur to any causes of action alleged against her (i.e., the first, sixth, and seventh); accordingly, they survive as against her.

the basis of the bar of the applicable statute of limitations (§ 340(3), one year; *Wiener v. Superior Court* (1976) 58 Cal.App.3d 525, 529.) They claimed that the original complaint alleged the publication of private facts took place in May 1985, more than one year before the filing date; the amended complaint then alleged the disclosures continued into May 1986, and were not discovered until January through May 1986. We agree with the trial court these amendments appear to be a sham attempt to evade the effect of the original allegations. (*Kenworthy v. Brown* (1967) 248 Cal.App.2d 298, 302.) Moreover, many of the allegations of this cause of action (including the alleged disclosure of records to *prosecutors'* investigators, although not including disclosure to *insurance* investigators) are superfluous in light of the extensive defamation claims, the legal malpractice claims directed at Monroe, and the breach of contract allegations against Cohn (eighth cause of action). (*Selleck v. Globe International, Inc.* (1985) 166 Cal.App.3d 1123, 1135-1136.) These general demurrers were properly sustained without leave to amend.

Turning now to the *sixth cause of action* for intentional infliction of emotional distress, the elements required to be pled are:

> "(1) [O]utrageous conduct by the defendant, (2) intention to cause or reckless disregard of the probability of causing emotional distress, (3) severe emotional suffering and (4) actual and proximate causation of the emotional distress. [Citations.]" (*Bogard v. Employers Casualty Co.* (1985) 164 Cal.App.3d 602, 616.)

Of the defendants here, only Monroe and Nadler demurred (generally and specially) to this claim. They argued it is unclear what bad conduct took place, since Krain only generally alleges that "within the last year" (i.e., June 1985-June 1986), all defendants threatened him in front

of his patients and made false accusations he was psychotic and guilty of Medi-Cal fraud; he also alleges they lied about their actions to authorities as part of the alleged "frame-up." It is also argued Krain could not have suffered severe emotional distress from these actions, since, by his own pleading, he was already mentally incompetent from April 1984 through October 1985.

Krain's alleged mental incompetence and other allegations he makes about his lost medical license raise serious questions about the propriety of this cause of action. In paragraphs 16, 23, 31, 43, and 64 of the amended complaint, Krain has alleged he was prevented from practicing his profession by an injunction obtained against him, and that he suffered damages due to his lost medical practice. Krain claims that when Cohn supplied information about him to investigators in May 1984 and 1985, his medical license was suspended; however, it is unclear when the suspension and injunction were imposed, and for how long. These allegations appear to be inconsistent on their face with Krain's allegations the defendants threatened and accused him *in front of his patients* (presupposing an active practice) between June 1985 and June 1986. Since the current allegations of this cause of action otherwise state in some form all of the required elements, Krain must be allowed an opportunity to amend this cause of action for intentional infliction of emotional distress to clarify the circumstances under which the alleged statements or conduct took place. However, we note that if any such amendment can be shown to be a sham pleading in light of the other allegations made on the face of the pleading, it would be properly stricken and possibly a proper subject of monetary sanctions as well.

Finally, we address the demurrers (special as to Monroe and Nadler, general as to Cohn) to the *seventh cause of*

action for negligent misrepresentation. The required elements of such a claim include: (1) a representation as to a past or existing material fact; (2) falsity; (3) that the representation was made without any reasonable grounds for believing it to be true; (4) intent to induce reliance; (5) justifiable reliance and unawareness of the falsity of the representation; and (6) damage incurred due to the reliance on the truth of the representation. (*Walters v. Marler* (1978) 83 Cal.App.3d 1, 17, disapproved on another point in *Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 507.) Here, all defendants argued there was insufficient specificity of pleading this form of deceit: misrepresentation, reliance, causation and damage were missing, as the trial court found.

Specifically, Cohn argues that this cause of action duplicates the allegations in the eighth cause of action, to which he did not demur; in both causes of action, Krain is alleging a promise was breached to keep his records confidential. Krain also alleges Cohn misrepresented the extent of his professional medical qualifications, which raises the same issues as does the claim for medical malpractice. However, Krain further claims negligent misrepresentation in that Cohn misrepresented that he was licensed as an attorney. We believe an opportunity should have been afforded Krain to amend this cause of action as to Cohn to delete redundant material already alleged in other causes of action, and to add the allegations now contained in the legal malpractice claim (i.e., that Cohn represented he was an attorney). Technically, based on the allegations currently made, Krain possibly may be able to plead alternate theories of negligent misrepresentation and actual fraud, based on the claim Cohn held himself out as an attorney. Therefore, while the demurrer for

insufficient facts was properly sustained as to Cohn, it should have been sustained with leave to amend.

Both Monroe and Nadler demurred to this claim for negligent misrepresentation on the grounds of uncertainty. As to Nadler, the misrepresentations alleged are about the diamonds to be provided and the witness to be located, in return for a fee of $75,000, which was paid. Nadler also allegedly falsely accused Krain of soliciting murder. Monroe is generally charged with the same sort of professional negligence that appears in Krain's cause of action for legal malpractice. It is not clear how the alleged misrepresentations by either of these defendants led to any particular damages traceable to this particular theory of liability. The material facts of the particular misrepresentations made, reliance, and causation are left to surmise. (*Ankeny v. Lockheed Missile & Space Co.*, *supra*, 88 Cal.App.3d 531.) While these demurrers were correctly sustained, amendment may be possible; it should have been allowed.

As to the various causes of action for which we have directed that Krain be permitted one more effort to amend, we express no opinion as to the likelihood of his success in that regard. Nor do we imply by our opinion that any more than one additional opportunity to amend is required under these facts. Krain is certainly no stranger to the courts and now has had the benefit of our review of each of his causes of action. We think, therefore, the time has come for Krain to file a pleading upon which this case can go forward; if he is unable to do so, he must suffer the appropriate consequences of any such failure.

DISPOSITION

The orders striking the first amended complaint are reversed.

The orders sustaining the demurrers without leave to amend and dismissing the first amended complaint are reversed in part as follows:

First Cause of Action (C/A) for Defamation: As to Monroe and Nadler (the only demurring defendants).

Second C/A for Medical Malpractice: As to Cohn.

Third C/A for Legal Malpractice: As to Monroe and Monroe, Inc., with directions to permit amendment.

Sixth C/A for Intentional Infliction of Emotional Distress: As to all demurring defendants, with directions to permit amendment.

Seventh C/A for Negligent Misrepresentation: As to all demurring defendants, with directions to permit amendment.

The balance of the orders is affirmed.

Upon return of the remittitur, the trial court is directed to establish a schedule for amendment of the pleadings and any extensions of time that may be granted to file responsive pleadings.

Each party shall bear its own costs on this appeal.

/s/ Huffman
HUFFMAN, Acting P.J.

I CONCUR:

/s/ Nares
NARES, J.

Froehlich, J., concurring:

I concur in the very detailed, most scholarly and highly instructive opinion of the majority, and write this brief separate opinion solely for the purpose of suggesting the propriety of a less meticulous approach to this matter.

We deal here with one complaint out of a flock, nay batch or even barrage of complaints, all filed by a plaintiff who admits his temporary mental incompetence and regular hospitalization. These complaints, filed in various courts and counties, seek damages from former treating physicians, fellow practitioners in the field of medicine, or alleged malpracticing lawyers, all of whose torts appear to have occurred when the plaintiff was being accused and tried for either criminal or nonprofessional acts. The mere volume and frantic tone of the dozens of pending complaints caused the trial judge in this case, reasonably I believe, to find that Krain's litigation was for an improper purpose.

Added to this smell of impropriety we have the stench of exceedingly poor pleading. Allegations of fact included in the original complaint are completely reversed in the amended complaint without explanation. Evidentiary material, set forth in detail, either does not contribute to any allegation of ultimate fact or patently does not constitute any actionable tort. Hysterical allegations of injury, interspersed throughout the pleading, tend to suggest to the reader that the pleader is irrational.

In the circumstances of this lengthy, rambling, apparently psychotic pleading, it is my view that great attention to legal analysis of its shortcomings is not required. It surely should not be required of a trial court. The majority is undoubtedly correct in its conclusion that some of the allegations of the complaint, if winnowed from the

bulk of the irrelevant and spurious material, constitute statements of actionable tort. The trial court is entitled, however, to require that the pleading omit extraneous, confusing, uncertain, and unintelligible material. I contend that the trial court is not required to advise the inept pleader as to which portions of his meandering and disjointed missive constitute good pleading as distinguished from the bad.

In short, the trial court in this case would have been on solid ground simply to have sustained the special demurrers for uncertainty, as to the complaint as a whole, requiring the plaintiff to start all over again. Since, however, this pleading was only Krain's second try, the trial court erred in refusing to grant leave to amend.

Concluding on this note, I emphasize my agreement with one line of the majority opinion, which I quote and to which I add emphasis: ". . . Krain should be entitled to at least *one more chance* to attempt to amend to clarify these problem areas."

/s/ Froehlich
FROEHLICH, J.

APPENDIX II

(Letterhead Of)
OFFICE OF THE CLERK
COURT OF APPEAL
FOURTH APPELLATE DISTRICT
DIVISION THREE

January 28, 1991

Robert Wandruff
Clerk, Supreme Court
350 McAllister Street, Room 4050
San Francisco, CA 94102

RE: G009106 LAWRENCE S. KRAIN vs.
RONI NADLER et al

Dear Mr. Wandruff:

Presiding Justice David G. Sills, Division Three, with the concurrence of Presiding Justice Daniel J. Kremer, Division One, wishes to transfer the above referenced appeal from the Fourth Appellate District, Division Three, to the Fourth Appellate District, Division One.

Three of the justices as well as our pro tem justice have heard various portions of this case while in the superior court.

The case is fully briefed and ready for oral argument.

Thank you for your consideration in this matter.

Sincerely,
STEPHEN M. KELLY, Clerk
By: JOYCE A. NOHAVEC
Joyce A. Nohavec, Deputy

Fourth Appellate District, Division One, No. D013870
S023480

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK [FILED JANUARY 15, 1992]

LAWRENCE S. KRAIN, Appellant

v.

RONI NADLER Et Al., Respondents

Appellant's petition for review DENIED.

Lucas, C.J., Panelli, J. and George, J. did not participate.

/s/ BAXTER
Acting Chief Justice